IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WARREN DURHAM JR., Plaintiff	)	C.A. No. 04-297 ERIE
V.	)	District Judge McLaughlin
CITY AND COUNTY OF ERIE, ET AL. Defendants.	)	

MOTION REQUESTING INTERLOCUTORY APPEAL

On March 26, 2006, the Plaintiff received from District Judge Sean J. McLaughlin a Memorandum Order filed March 16, 2006, adopting in part and rejecting in part the Report and Recommendation by Magistrate Judge Baxter as the opinion of the Court. After *De Novo* Review, Judge McLaughlin ordered that Defendants McElynn and County of Erie be dismissed from the case. The Plaintiff is therefore requesting permission for an interlocutory appeal because such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Plaintiff states as follows:

1. The Supreme Court's holding in Buckley v. Fitzsimmons, 113 S. Ct. 2606 (1993), made perfectly clear that prosecutors were not entitled to absolute immunity on the claim that they knowingly obtained false statements from a witness for the purpose of prosecuting the plaintiff. Noting that shopping for a dubious expert opinion was unprotected by absolute immunity.

2. The Plaintiff properly alleged that Defendant McElynn obtained false statements from Defendants Tackett, Washburn, and Durkin.

3. The Plaintiff properly alleged that Defendant McElynn allowed false testimony from Defendant Tackett as an expert witness.

4. The Buckley Court also ruled that prosecutors did not have absolute immunity for comments made to the media. However, Judge McLaughlin relying on a case decided by the Third Circuit nearly two years after the Plaintiff filed the instant action to deny relief. See:

Jerrytone v. Musto, 2006 WL 162656 (3d Cir. 2006).

5. The Plaintiff's case should be decided on the Supreme Court's holding in Kalina v. Fletcher, 118 S.Ct. 502 (1997), that a prosecutor is not entitled to absolute immunity when holding a press conference. See: Donahue v. Gavin, 280 F.3d 371 (3d Cir. 2002)(concurring).

6. Defendants McElynn and Anthony followed an unconstitutional custom violating Plaintiff's constitutional right to a fair trial based on evidence which the Defendants knew to be tainted, falsified, or otherwise unreliable.

7. Moreover, based on the trial transcripts, Defendant Anthony allowed a biased jury to render a guilty verdict against the Plaintiff. Additionally, Defendant Anthony followed an unconstitutional custom when not insuring that any and all scientific testimony and evidence admitted was not only relevant but reliable. The DNA evidence presented was tainted and the testimony presented to the jury of a DNA match was false. See: Turner v. City of Philadelphia, 22 F.Supp. 2d 821 (E.D.Pa.1998) ; Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir.1990). Clearly the County of Erie is liable for the unconstitutional custom of Defendants McElynn and Anthony.

WHEREFORE, the Plaintiff is respectfully requesting that an interlocutory appeal be allowed.

Respectfully submitted,

Warren Durham Jr.

WARREN DURHAM JR.

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CERTIFICATE OF SERVICE

I, Warren Durham Jr., hereby certify that I am this day serving a true and correct copy of the foregoing "Motion Requesting Interlocutory Appeal" upon the persons named below by FIRST CLASS MAIL, postage prepaid, to:

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